MAH HO LOOI @ MAH HOW NEE

v.

CHOONG KOK SINGH @ CHAN KOK SUN

HIGH COURT MALAYA, TAIPING
DATO HJ ABDUL MALIK BIN HJ ISHAK J
[CIVIL SUIT NO: 22-21 OF 1993(T)]
31 DECEMBER 1994

TORT: *Trespass to land - Allegation of encroachment into plaintiff's land - Whether trespass made out - Quality of evidence adduced - Whether sufficient to establish trespass on the part of the defendant.*

The plaintiff alleged that the defendant, the owner of an adjoining piece of land, had trespassed into and unlawfully erected a timber building on her land. The plaintiff sought orders requiring the defendant to demolish the timber building and for delivery of vacant possession of the said area and damages and costs.

At the conclusion of the evidence led on behalf of the plaintiff, the defendant made a submission of no case to answer. The question that arose was whether the evidence led on behalf of the plaintiff was sufficient to make out trespass against the defendant.

Held:
The poor quality of the evidence adduced on behalf of the plaintiff did not establish trespass on the part of the defendant. Accepting the plaintiff's evidence at its face value, no case has been established in law and the defendant's submission of no case to answer must necessarily succeed.

Obiter dicta:
It would be a desirable practice in our Courts to allow a submission of no case to answer at the end of the plaintiff's case, and at the time putting the defendant to his election, whether to call evidence or not, if his submission fails. Such a practice will ensure not only that there is a thorough preparation of the case before trial, but also a careful presentation of it at the trial proper.

[Plaintiff''s claim dismissed with costs].

Cases referred to:
KPM Khidmat Sendirian Berhad v. Tay Kim Suie [1994]2 AMR 28:1417/ [1994]3 CLJ 111 SC at pp. 1422 - 1423 ***(foll)***
Julaika Bivi v. Mydin [1961] MLJ 310 ***(refd)***
Tan Song Gou v. Goh Ya Tian [1983]1 MLJ 60 ***(foll)***
Storey v. Storey [1960]3 ALL ER 279 ***(refd)***

Other sources referred to:
Halsbury's Laws of England, 3rd Edn., Vol. 38 & p. 739

For the plaintiff - Ahmad Kamal bin Hj. Ayob; M/s Maxwell Kenion Cowdy & Jones
For the defendant - Manjit Singh Bhatt; M/s Manjit, Subra & Assoc.

JUDGMENT

Hj Abdul Malik bin Hj Ishak J:

The plaintiff is the registered owner of all that pieces of land measuring 29,246 square feet held under H.S.(D) LM 172/86, Lot number 2288 in the Mukim of Assam Kumbang in the State of Perak since 26 June 1986. The defendant is the owner of a piece of land known as Lot number 14306 and this land adjoins the land belonging to the plaintiff.

It was averred in the statement of claim that the defendant had trespassed into and unlawfully erected a timber building on the plaintiff's land. The encroachment was said to be 3,940 square feet.

By way of a civil suit, the plaintiff sought for the following orders:

(a) an order that the defendant do immediately remove the said timber building from the said plaintiff's land;

(b) the defendant deliver vacant possession of the said area measuring more or less 3,940 square feet to the plaintiff;

(c) damages;

(d) costs; and

(e) such further or any other relief this Honourable Court deems fit.

The plaintiff gave evidence and she testified that before Lot number 2288 was alienated to her, she held a Temporary Occupation Licence ("TOL") from 1976 to 1984 and the size of the land held by her under TOL then was 14,520 square feet. But unfortunately, neither the plaintiff nor her witnesses could enlighten this Court as to which portion of Lot number 2288 was given to her under TOL. Several TOL documents were introduced (Exhibits P2A to P2H) to back up her claim but sad to say these TOL documents were without sketch plans and, thus, it would be humanly impossible to determine which part of Lot number 2288 that the TOLs were given to her. However, one thing is certain and it is this. The plaintiff's witnesses agreed that the size of the land alienated to the plaintiff was bigger than that held by the plaintiff under TOL.

In examination-in-chief, the plaintiff admitted that since 1976 she was never in occupation of Lot number 2288 - a fact if relayed to the State Government of Perak would certainly threaten her title to the land then. Be that as it may, it can reasonably be inferred from the tenor of her evidence that she had no personal knowledge of the trespass on her land.

Yeoh Hoe Chuan (PW2), the holder of a Power of Attorney for the plaintiff, thought that the defendant's building had encroached into the plaintiff's land. PW2 first realised of this encroachment way back in 1976 when he visited the plaintiff's land - an assertion which to say the least was absurd bearing in mind that it could not be ascertained which part of Lot number 2288 was held by the plaintiff in 1976 under TOL. In an effort to establish and bolster up her claim that there was trespass, the plaintiff called a licensed surveyor in the person of Sow Tung Low (PW3). PW3's evidence was crucial to the plaintiff's case. But, through an oversight, not a shred of evidence of was led in examination-in-chief of PW3 that the defendant had encroached into the plaintiff's land. PW3 testified that the plan as per exhibit (P13) especially with a blue colouring indicated encroachment of the building and fencing on Lot number 2288 but he did not say that the building and fencing that had encroached into Lot number 2288 was part and parcel of the building and fencing that was built on Lot 14306.

Incidentally, in the statement of claim the plaintiff did not plead that the defendant's fencing had encroached into the plaintiff's land and, consequently, PW3's evidence was highly suspect. The sanctity of sticking to one's pleadings should apply to the plaintiff. To add insult to injury, PW3 agreed under cross-examination that (P13) was prepared solely for the purpose of issuance of the title to Lot number 2288. This piece of evidence was indeed damaging to the plaintiff and it is compounded further by the failure to lead evidence as to whether any survey was conducted for Lot number 2288 to determine the question of trespass and encroachment thereto. What is more surprising is this. PW3 admitted that he did not personally conduct the survey that was carried out on 20 August 1985 and he left the job entirely to his technician. It was the technician that visited the site of Lot number 2288 and did the appropriate survey and prepared (P13) not for the purpose of ascertaining encroachment but rather for the sole purpose of expediting issuance of title. (P13) also did not have a legend annexed to it to show the alleged encroachment on Lot number 2288. (P13) is therefore worthless and of no value to the plaintiff as far as this civil suit is concerned. Lest I be accused of an oversight, there is a letter marked ID.64 from PW3 dated 20 January 1990 which is reproduced below for convenience:

> 20 Jan 1990
>
> To,
> M/s. Yeoh Kian Teik & Co.,
> 35 Jalan Dato Maharaja Lela,
> P.O. Box 368,
> 30740 Ipoh.
>
> Dear Sir,
>
> **Re: Surveyor Report on Lot 2288**
> **Mukim Asam Kumbang**
>
> Your letter dated 12 January 1990 refers.
>
> Attached herewith is a certified plan from (the) Survey Department Perak.
>
> The lot which is coloured "RED" shows the actual boundaries (boundary) of Lot 2288. The block which is coloured 'BLUE' shows the encroachment by lot 14306.
>
> Together is a bill for your attention.
>
> Thank you.
>
> Yours faithfully,
>
> Sgd.
>
> ...
>
> Sow Tung Low
> Juruukur
> Berlesen di bawah Undang-Undang No. 11/1953."

The certified plan referred to in this letter refers to Exhibit (P13) and in my judgment the failure to call the maker of (P13) by the plaintiff was fatal. On this point, the case of *KPM Khidmat Sendirian Berhad v. Tay Kim Suie* [1994]2 AMR 28:1417, [1994]3 CLJ 111 SC at pp. 1422 - 1423, serves as an authority for the proposition that the maker must be called to explain the facts and the basis of a particular document.

The plaintiff here must have been very complacent. She thought that by establishing her TOL status way back in 1976 she could rely on the principle propounded by Neal J in *Julaika Bivi v. Mydin* [1961] MLJ 310 where it was held that an action for trespass will lie at the instance of the holder of a TOL. But the quality of the plaintiff's evidence and that of her witnesses cannot even tilt the scales in her favour. In passing, it is apt to mention that a holder of TOL has exclusive right to occupy the land in respect to which the licence is issued to the exclusion of any other person. During the period wherein the licence is valid, the licensee has a vested right to immediate and exclusive possession to the land.

Reverting back to the evidence of PW2, he had the audacity to say towards the end of his examination-in-chief that encroachment took place in the middle of 1970 but he took action only in 1987. This piece of evidence went counter to his earlier testimony that it was in 1976 that he first realised about the encroachment. Be that as it may, I am of the considered view that trespass once established (which is not the case here) could persist and become continuous. In a continuing trespass a fresh cause of action arises day to day. *Di die in diem. Halsbury's Laws of England*, 3rd Edn., Vol. 38 at p. 739 sets out the meaning of trespass to land:

> Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or, it seems, if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land.

Another witness called by the plaintiff was Kamaruddin bin Hassan (PW4), the Assistant Land Administrator, Larut and Matang, Taiping who unfortunately could not enlighten this Court as to what portion of Lot number 2288 was given to the plaintiff under TOL for the years between 1976 to 1984 for the simple reason that the relevant file from the Land Office was not available. Somehow, the relevant office file went missing and, in a rather cautious manner, (PW4) proceeded to explain that it could be misplaced. Of course (PW4) was totally blameless as the Land Office had, over the last four years, shifted twice to different premises. The rest of the evidence of PW4 revolved on the general practice and procedure adopted by the Land Office - mundane and routine evidence which was of no consequence at all.

Needless to say with the poor quality of the evidence advanced by the plaintiff, Mr. Manjit Singh Bhatt submits on behalf of the defendant that he wishes to make an election not to call evidence and to make a submission that there is no case to answer. I have taken the necessary precautions particularly my refusal to make a ruling unless Mr. Manjit Singh Bhatt elects to call no evidence (*Tan Song Gou v. Goh Ya Tian* [1983]1 MLJ 60). In my judgment, it would be a desirable practice in our Courts to allow a submission of no case to answer at the end of the plaintiff's case, and at the same time putting the defendant to his election, whether to call evidence or not, if his submission fails. Such a practice will ensure not only that there is a thorough preparation of the case before trial, but also a careful presentation of it at the trial proper. I am sure this practice will bring about a saving of costs for the parties.

On the subject of no case to answer, *Storey v. Storey* [1960]3 ALL ER 279 had this to say:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the Court should find that the burden of proof has not been discharged.

The plaintiff's case would fall squarely within the first category as the evidence led, to say the least, did not establish trespass on the part of the defendant. Accordingly, I ruled that the plaintiff had made out no case and, I, unhesitantly dismissed it with costs.